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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Unit 3, Intermountain Power Service Corporation, Millard County, Utah DAQE-AN0327010-04 In the Matter of: Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	EXECUTIVE SECRETARY'S CONSOLIDATED REPLY TO SIERRA CLUB'S MEMORANDUM IN OPPOSITION TO MOTION FOR JUDGMENT ON PLEADINGS

Pursuant to Rule 7(c)(1) of the Utah Rules of Civil Procedure, the Executive Secretary of the Utah Air Quality Board ("Executive Secretary") submits this Reply to Sierra Club's Memorandum in Opposition to the Executive Secretary's Motion for Judgment on the Pleadings.

INTRODUCTION

Neither the Executive Secretary nor the Sierra Club dispute the legal standard the Board must apply in deciding whether to grant or deny the Executive Secretary's motion for judgment on the pleadings. To wit, that the Board may not look beyond the material allegations in the pleadings and must take such factual allegations of the nonmoving party as true. Accordingly, the Board may grant the motions only if, as a matter of law, the plaintiff could not recover under the facts alleged. The purpose behind summary disposition (such as judgment on the pleadings)

is to dispense with those issues in which there is no genuine issue of material fact. Then the Board can rule upon the issue as a matter of law, without the need for a hearing to conduct fact finding. If there is a single genuine issue of material fact then summary disposition is not proper.

The standard is straightforward and the Executive Secretary agrees with the principle that if there is any doubt about whether a genuine issue of material fact exists, the issue should be resolved in favor of giving the party an opportunity to present its proof. As a general matter, the Executive Secretary will focus on those aspects of Sierra Club's Opposition Memorandum that respond to the Executive Secretary's arguments. However, before proceeding to a discussion of the claims addressed by the Sierra Club, the Executive Secretary will clarify Sierra Club's numerous misstatements of law and attempt to re-focus the discussion on the proper standards that the Board must follow to make a decision.

I. SIERRA CLUB HAS APPLIED THE WRONG STANDARDS.

A. The Board is not an Appellate Court.

Sierra Club wrongly likens the Board to an appellate court. At a hearing on the merits the Board is a fact finder – the administrative equivalent of a judge and jury.[1] The burden of proof is a preponderance of the evidence.[2]

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[1] *See* Utah Code Ann. § 63-46b-8, which governs the procedures for formal adjudicative proceedings. Because Sierra Club has filed a Request for Agency Action to contest an Initial Order of the Executive Secretary, this case is a formal adjudicative proceeding. *See also* § 63-46b-3 (commencement of adjudicative proceedings); Utah Admin. Code R307-103-4 ("[c]ontest of an initial order . . . shall be conducted as a formal proceeding"). By contrast, judicial review by the Court of Appeals or the Supreme Court employs different standards, as outlined in § 63-46b-16. It hardly seems plausible that the Legislature would provide one set of standards to govern adjudicative proceedings before the Air Quality Board and another to govern judicial review by the Court of Appeals if the Legislature intended both to apply the same standards. The bright line between these two standards is not blurred simply because these proceedings are adjudicative in nature.

[2] Walker v. Bd. of Pardons, 803 P.2d 1241 (Utah 1990) (stating that in administrative proceedings, the burden of proof is a preponderance of the evidence).

Sierra Club's underlying claim is that the Executive Secretary's decision to issue the air quality permit violated Utah law, in this case, the Board's permitting requirements. If no challenge had been made, or no evidence were presented at a hearing establishing that issuance of the permit violated the law, the Board would have no basis on which to determine whether the Executive Secretary's decision was legally invalid. As the party asserting that mistakes were made, Sierra Club has the burden of presenting the evidence that the Executive Secretary's decision violated the law.

B. Sierra Club's Reliance on "Incorporated Materials" is Improper.

The Legislature and the Board have specified that a request for agency action is the exclusive method for a party such as Sierra Club to challenge the Executive Secretary's decisions. Utah Code Ann. 63-46b-3(1)(b); *see also* Utah Admin. Code R307-103-3(2) (stating that a request for agency action must comply with the Administrative Procedures Act). Utah Code Ann. 63-46b-3(a)(vi) requires that a party contesting an initial order of the Executive Secretary to provide "a statement of the facts and reasons forming the basis for relief or agency action." The Board looks only to the request for agency action to determine a party's allegations, not to reams of supplemental material that do not contain the required "statement of facts and reasons." Thus, to the extent that Sierra Club relies on these "incorporated" materials as stating a claim or making an accusation of any kind, those materials must be ignored.

As the initiating party in this dispute, Sierra Club has the advantage of articulating its allegations in its request for agency action. Sierra Club is now married to its claims, and cannot expand on them by relying on extraneous materials incorporated by reference that are not of themselves claims. Moreover, Sierra Club's reliance on such "incorporated materials" is

improper for at least two other reasons. First, the allegedly incorporated materials are, at best, exhibits attached to Sierra Club's pleadings, and are not of themselves pleadings or allegations of any kind. Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983), *overruled on other grounds by* Meadowbrook, LLC v. Flower, 959 P.2d 115, 119 (Utah 1998). Second, by claiming that such materials establish its factual allegations, Sierra Club is apparently asking the Board to accept Sierra Club's word that its 2,000 pages of "incorporated" materials must at some level contain a disputed fact. However, Sierra Club cannot assign to the Board the task of rooting through Sierra Club's supplemental materials to ferret out whether some disputed fact may exist. To articulate its allegations, Sierra Club must rely solely on the RFA and nothing more.

Having established that Sierra Club cannot rely on its allegedly incorporated materials, the Board must look only to the allegations in Sierra Club's RFA. However, even relying solely on the RFA, Sierra Club cannot prevail because Sierra Club relies not only on its factual allegations but also on bare legal conclusions. However, the sufficiency of the [request for agency action] "'must be determined by the facts pleaded rather than the conclusions stated.'" Franco v. The Church of Jesus Christ of Latter-day Saints, 21 P.3d 198, 206 (Utah 2001). Arguments about legal requirements are not the same thing as arguments about what the Executive Secretary did as part of his permit review process, and the Board need not take as true Sierra Club's arguments about the legal requirements. Rather, as Sierra Club correctly notes, it is the Board's prerogative to interpret the law. Sierra Club Memorandum in Opposition at 11.

C. Sierra Club Relies on Legal Conclusions Instead of Factual Allegations.

Every claim has two components: 1) what happened and 2) the legal consequence of what happened. The former are questions of fact, the latter are questions of law. Although Sierra

Club claims that the facts are disputed, it devotes much of its memorandum to arguing about legal conclusions, insisting that they must be taken as true: "the Board must accept *everything* Sierra Club has alleged as true . . . ." Sierra Club Memorandum in Opposition at 10-11.

In the two claims in question, the only issue is over the legal consequence of the Executive Secretary's decisions. In both RFAs, Sierra Club alleges that the Executive Secretary's decisions were not in accordance with the law. To determine whether that allegation is true, one must first identify the conduct complained of (the factual question), and then determine what the legal requirements are (the legal question). Only by examining both aspects in the proper order can the Board actually view the whole picture.

In an attempt to save its claims from dismissal, Sierra Club detours into a lengthy and unnecessary discussion of the merits of its claims despite its acknowledgment that the merits are not at issue. Sierra Club Memorandum in Opposition at 10. The net effect of this unnecessary discussion is that Sierra Club consumes literally pages of argument before returning to the exact spot where it should have started, with a discussion of the legal requirements. *See* Sierra Club Memorandum in Opposition at 11 (". . . . many of Sierra Club's claims rest on the Board's ultimate conclusions as to what the law is, ...") (emphasis in original).

Although the Board must take Sierra Club's factual allegations as true, this principle must be squared with the principle that the Board should look only to the material facts. Even Sierra Club acknowledges that this must be done: "[i]n deciding these motions, the Board will 'look solely to the *material* allegations of [the plaintiff's] complaint.'" *Id.* (emphasis added); *quoting* Colman v. Utah Land Bd., 795 P.2d 622, 624 (Utah 1990).

If those material facts are undisputed (irrespective of the parties' characterization of those facts), then the Board must decide whether the moving party is entitled to judgment as a matter of law. Any discussion of ultimate legal conclusions or factual allegations that are not material, even if taken as true, is ignored because those conclusions and allegations have no bearing on the question before the Board.

In the next section the Executive Secretary seeks to right the ship and re-focus the Board's attention on the proper standards for deciding the motion.

III. ARGUMENT

A. Integrated Gasification Combined Cycle (IGCC)

With respect to this claim, the pleadings demonstrate that the parties agree on the following material facts: (1) that IGCC is a method of producing electricity by gasifying coal; (2) that IGCC is a distinct power production process from the pulverized coal-fired power plant proposed by IPSC and the circulating fluidized bed coal-fired proposed by SPC; (3) that the Executive Secretary did not require consideration of IGCC as part of the BACT analysis for either the proposed IPSC or SPC power plants.

Tellingly, the only aspect of the Executive Secretary's Statement of Undisputed Facts that Sierra Club contests is the statement that "IGCC is not a control technology but rather a separate process from the proposed CFB technology." Executive Secretary's Memorandum in Support at 4. The Executive Secretary acknowledges that statement to be a legal conclusion. Thus, not one of the Executive Secretary's statements of undisputed fact are actually disputed by Sierra Club. Sierra Club is wise not to dispute those statements, since most of them are taken verbatim from

Sierra Club's Requests for Agency Action. *See* Sierra Club SPC RFA at 3-4; Sierra Club IPSC RFA at 4-7.

Unable to retreat from its own factual allegations, Sierra Club instead embarks on yet another lengthy, but ultimately irrelevant, discussion on a series of legal conclusions from its Request for Agency Action. Accordingly, the Executive Secretary will show that in each case, the alleged "facts" are actually legal conclusions that deserve no consideration by the Board. As noted above, while factual allegations must be taken as true, legal conclusions need not be. All of Sierra Club's "facts" (presented in italics) assume that IGCC must be included in a BACT analysis, but this is the threshold question that the Executive Secretary asks the Board to decide.

1. *"IGCC is a method of producing electricity by gasifying coal, removing pollutants – including greenhouse gases – before combustion, and then burning the 'clean' syngas in a modified combined cycle gas-fired power plant."* Sierra Club Memorandum in Opposition at 15. As noted in his Motion, the Executive Secretary agrees with this description of IGCC (taken directly from Sierra Club's RFA). Thus, there is no dispute about what IGCC is. However, to the extent that Sierra Club argues that IGCC is a method "for control of each such pollutant" under the BACT definition, this is a conclusion of law, one that the Board must decide.

2. *"IGCC is an available technology for producing electricity from coal."* Sierra Club Memorandum in Opposition at 15. The question of availability cannot be determined until Step 2 of the BACT analysis. The dispute is over whether IGCC should even be considered as a control technology in the first instance. Thus, any discussion of availability is irrelevant.

3. *"IGCC is technically feasible for the IPSC and SPC projects."* Sierra Club Memorandum in Opposition at 15. For the same reason as No. 2 above, discussion of technical feasibility is only relevant once it is determined whether IGCC should be included in a BACT analysis at all: this is the precise legal question that the Proponents' motions ask the Board to answer.

4. *"IGCC is the top-ranked control technology."* Sierra Club Memorandum in Opposition at 15. Stating that IGCC is the top-ranked control technology assumes that IGCC is properly part of the BACT analysis. But that is the very question the

Board is called upon to answer. As such, this is not a factual allegation, but is a legal conclusion. Therefore, the Board need not accept it as true.

5. *"IGCC is an available, demonstrated clean coal combustion technology with significant emission reduction benefits."* Sierra Club Memorandum in Opposition at 16. Again, questions of availability assume that IGCC is properly part of the BACT analysis, a question the that Board will answer. As such, discussion of whether IGCC is available or demonstrated are irrelevant legal conclusions.

6. *"IGCC is a production process that can be used to produce electricity from coal."* Sierra Club Memorandum in Opposition at 16. As noted above, whether IGCC is a process for "control" of pollutants under the BACT definition is a legal conclusion.

7. *"IGCC is a method for generating electricity from the combustion of coal."* Sierra Club Memorandum in Opposition at 16. Whether IGCC is a process for "control" of pollutants, as those words are used in the BACT definition, is a legal conclusion.

8. *"IGCC is an innovative fuel combustion technique, and Congress intended that coal gasification be included among the 'innovative fuel combustion techniques' considered in BACT analyses."* Sierra Club Memorandum in Opposition at 16." "Innovative fuel combustion technique" is a term of art used in the BACT definition, and thus is a legal conclusion. Unless and until the Board determines that IGCC even belongs in a BACT analysis, any discussion of these terms is irrelevant. Moreover, for reasons stated above, Sierra Club's reliance on legislative history contained in the "incorporated materials" that are not properly part of its RFA is impermissible and all references thereto should be flatly ignored. In any event, the Board is not charged with the interpretation of legislative history, and should resist Sierra Club's invitation to divine the intent of one legislator's statement.

9. *"Requiring consideration of IGCC would not be redefining the source."* Sierra Club Memorandum in Opposition at 16. This statement assumes that IGCC must be required in the BACT analysis, the very question Proponents' ask the Board answer. Thus, it is a legal conclusion and not a factual allegation. As such, the Board need not take it as true.

Since the material facts are undisputed and Sierra Club cannot rely on labeling a question of law a factual allegation, the undisputed facts show that the only task for the board is to say what the law is.

As the Executive Secretary has noted in his initial Memorandum, BACT is an "emission limitation" to control emissions from an "emitting installation" that the Executive Secretary "determines is achievable for such installation . . . ." Utah Admin. Code R307-101-2(4). Utah Admin. Code R307-101-2 defines an installation as "a discrete process with identifiable emissions which may be part of a larger industrial plant. The BACT rule goes on to state that determining what is achievable "for such installation" includes "application of production processes and available methods, systems and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques". Utah Admin. Code R307-101-2(4). To reiterate, the BACT analysis is based on control technologies that can be applied to an installation that has already been identified.

Consistent with longstanding state and federal policy, the Executive Secretary does not dictate what type of facility the permit applicant must build: ". . . . permit conditions defining the emissions control systems 'are imposed on the source as the applicant has defined it' and that 'the source itself is not a condition of the permit.'" In Re: Prairie State Generating Co., 2006 WL 2847225 (EAB 2006). Therefore, for purposes of the BACT analysis, the Executive Secretary "looks to how the permit applicant defines the proposed facility's purpose or basic design in its application . . . ." *Id.* By contrast, insisting that a source consider a completely different facility as part of the BACT analysis constitutes "redefining the source," which is a term of art used by the EPA in its New Source Review Workshop Manual ("NSR Manual"). Redefining the source

means to substitute one design process for an entirely different design process. As noted above, there is no dispute between Sierra Club and Proponents that an IGCC facility is a separate facility from the proposed CFB Boiler (in the case of SPC) and the PC Boiler (in the case of IPSC).

Sierra Club presents the Prairie State decision as an "endorsement" of its claim that IGCC must be considered as part of the BACT analysis. Sierra Club Memorandum in Opposition at 25. However, that question was never raised in the case, and thus the Board did not decide it. In fact, in the very same paragraph Sierra Club takes a position directly contrary to the Prairie State case on which it relies. Sierra Club states that "IGCC is a production process for generating electricity from coal" and that "IGCC involves the identical raw material - coal - and the identical finished product - electricity - as the generation technology proposed by IPSC and SPC" such that "IGCC [must] be considered as part of a BACT analysis." *Id.* However, the very case on which Sierra Club relies in part for support holds directly to the contrary: "We . . . specifically reject the . . . . contention that an electric generating facility's purpose must be viewed as broadly as 'the production of electricity, from coal.'" Prairie State, 2006 WL 2847225 (EAB 2006).

In any event, the EPA guidance upon which Sierra Club also relies states that sources are not generally required to redefine the scope of their proposed facilities as part of the BACT analysis: "applicants proposing to construct a coal-fired electric generator would not be required as part of the BACT analysis to consider building a natural gas-fired electric turbine although the turbine may be inherently less polluting per unit product (in this case electricity)." NSR Manual at B.13. Thus, based on 1) the most recent federal administrative question on this issue and 2) the applicable federal guidance, requiring a source to build an IGCC facility instead of the one it

proposed would constitute redefining the source. Both authorities contradict Sierra Club on this question.

The Executive Secretary reiterates that EPA guidance does not preclude permitting authorities from exercising some discretion in this area, and some states have exercised this discretion to require that IGCC be considered as part of the BACT analysis.[3] On the other hand, in choosing not to use the BACT rule in such a manner, the Executive Secretary was in line with the EPA as well as permitting authorities in all other states to consider the issue.[4]

B. GREENHOUSE GASES

The Executive Secretary repeats what he said in his initial Memorandum: in this claim, Sierra Club makes the single factual allegation that the Executive Secretary did not require regulation of greenhouse gases. The Executive Secretary does not dispute this allegation and acknowledges that he did not require regulation of greenhouse gases. Thus, there is no genuine issue of material fact.

In an attempt to avoid dismissal, Sierra Club follows the same procedure as with its IGCC claim: characterizing legal conclusions as factual allegations. All Sierra Club's arguments against dismissal go to the interpretation of various statutes and rules, and not to the baseline

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[3] Illinois, Montana and New Jersey are three states whose regulatory authorities have required consideration of IGCC as part of BACT.

[4] Wisconsin, Wyoming, and Kentucky are among those states who have determined not to include IGCC in the BACT analysis for a coal-fired power plant on the rationale that selection of IGCC as BACT would redefine the design of the proposed coal-fired plants. See Wisconsin Electric at 2005 WL 3450602. In Wisconsin, a review board held that IGCC does not qualify because IGCC cannot be applied to the installation as proposed "[r]ather IGCC is an altogether different method of generating electricity that would involve the wholesale substitution of one type of physical plant for another." Wisconsin Electric Power Co., 2005 WL 3450602 (Wisc. Div. Hrg. App. Feb. 3, 2005). An Environmental Appeals Board in Hawaii also concluded that regulations for determining BACT "do not mandate that the permitting authority redefine the source in order to reduce emissions." See In the Matter of Hawaiian Commercial & Sugar Co., PSD Appeal No. 92-1, 4 E.A.D. 95, 99-100, 1992 WL 191948 (July 20, 1992).

factual question of what the Executive Secretary did. As a result, Sierra Club has not identified any disputed fact. Accordingly, the claim should be dismissed.

Sierra Club insists that its legal conclusion that "greenhouse gases are 'air pollutants'" justifies its secondary legal conclusion that the Executive Secretary must regulate air pollutants through the BACT requirement. Sierra Club Memorandum in Opposition at 36. Even if taken as true, neither the Clean Air Act nor the Utah Air Conservation Act lists greenhouse gases as regulated pollutants or contains any other requirement to regulate greenhouse gases. Regulation of greenhouse gases would require rulemaking by the Board, which has not occurred. Because the Board has not made any rules requiring the regulation of greenhouse gases, the Executive Secretary had no rule to enforce, and thus was correct as a matter of law in not requiring regulation of greenhouse gases in the Approval Orders for IPSC and SPC.

Other than an inference from the BACT definition (itself a legal conclusion), Sierra Club fails to identify any rule that provides for the regulation of greenhouse gases. Further, Sierra Club's reliance on the BACT rule is misplaced and out of context. As the Executive Secretary has explained, a full reading of the entire BACT rule shows that the "environmental impacts" considered during a BACT analysis apply to ". . . *each pollutant subject to regulation* under the Clean Air Act and/or the Utah Air Conservation Act . . . ." Utah Code Ann. R307-101-2(4) (emphasis added). Therefore, the BACT rule governs only pollutants that are already regulated, and the Executive Secretary was not allowed to consider any theoretical environmental impacts of greenhouse gases during the BACT analysis.

CONCLUSION

Sierra Club has relied on improper standards to prevent dismissal of its claims relating to IGCC and greenhouse gases. As the Executive Secretary has shown, in both cases there are no disputed facts, and as a matter of law, Sierra Club cannot prevail on its claims as alleged. Accordingly, the Executive Secretary respectfully requests that the Air Quality Board grant the Motion for Judgment on the Pleadings.

Dated this 26th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby c

ertify that on the 26th day of March, 2007, a true and correct copy of the foregoing Executive Secretary's Motion for Partial Judgment on the Pleadings was mailed, postage prepaid, and/or emailed to the following:

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